BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

COLLETTE WATSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,461
JOHNSON CONTROLS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Julie A. N. Sample's April 6, 2000, Award. The Appeals Board heard oral argument on September 13, 2000.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Denise E. Tomasic of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant a 31.75 percent permanent partial general disability based on a work disability found by averaging a 23.5 percent work task loss and a 40 percent wage loss.

On appeal, claimant contends she proved she is entitled to a much higher work disability award. Claimant argues that her work-related injuries and resulting permanent restrictions, coupled with her limited educational background of completing only the eleventh grade of high school, have resulted in claimant not retaining any ability to re-enter the open labor market. Claimant argues that until she is able to obtain a GED, and at the close of the record claimant was enrolled in a program to help her obtain the GED, she is

unemployable and her wage loss component of the work disability test is 100 percent. Further, claimant argues that her work task loss should be 78 percent as established through the more credible permanent restrictions imposed by Jennifer E. Finley, M.D. Thus, claimant asserts that she is entitled to a work disability award in the amount of 89 percent based on a 78 percent work task loss and a 100 percent wage loss.

In contrast, respondent, in its brief, argues that claimant voluntarily terminated an accommodated job provided by the respondent within claimant's permanent restrictions that paid a comparable wage. Thus, respondent argues that claimant's permanent partial general disability benefits are limited to her permanent functional impairment, if any. But respondent also argues that claimant failed to prove through the opinion of either Dr. Lynn D. Ketchum or Dr. Finley that claimant's work-related injuries resulted in any permanent functional impairment. Additionally, respondent argues, if the Appeals Board finds claimant is entitled to a work disability, claimant failed to make a good faith effort to find appropriate employment. Accordingly, respondent argues the evidence contained in the record proves that claimant retains the ability post-injury to earn wages from $290 per week to $320 per week. Thus, respondent asserts a post-injury wage should be imputed to the claimant in computing the wage loss component of the work disability test.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board finds that the Administrative Law Judge's Award should be modified to award claimant a 50 percent permanent partial general disability.

Findings of Fact

1. Respondent manufactures plastic bottles from 12 ounces to 2 liters in size.

2. On June 17, 1994, claimant started working for respondent as a material handler and was later transferred to a bulk machine operator.

3. Starting in approximately January 1995, claimant was required to work 12-hour shifts for the respondent as a bulk machine operator.

4. Claimant's job duties as a bulk machine operator were repetitive hand-intensive duties requiring claimant to push and pull wooden pallets in place, place a top sheet on each layer of the plastic bottles coming off the bulk machine, and then place a cardboard band around the layers of bottles stacked on the wooden pallets.

5. As claimant was working these 12-hour shifts, she started having pain and discomfort in her right elbow. She reported her problems to the respondent.

6. Respondent sent claimant for evaluation and treatment to the Business and Industry Health Group where she was seen by Dr. Ramos Americo. Dr. Americo diagnosed claimant with a mild right elbow strain and prescribed medication, an elbow brace, and physical therapy.

7. As claimant continued to perform repetitive hand-intensive duties of the bulk machine operator, her right elbow remained symptomatic.

8. Claimant was then referred to orthopedic surgeon Lanny W. Harris, M.D. Dr. Harris first saw claimant on May 23, 1995. He placed claimant's right arm in a sling and returned claimant to light work with the left arm only.

9. Claimant testified her left arm then became symptomatic as she was performing light work with the left arm.

10. Claimant was also seen in July 1995 by physiatrist Vito J. Carabetta, M.D. Dr. Carabetta administered steroid injections for treatment of claimant's bilateral lateral humeral epicondylitis condition.

11. On November 27, 1995, at the suggestion of respondent's human resources director, claimant was placed on a voluntary layoff in order to rest her continuing upper extremity problems.

12. Claimant remained under the care and treatment of Dr. Harris. He directed claimant to undergo a functional capacity evaluation (FCE) on March 26, 1996. Results of the FCE determined that claimant had not given maximum effort during the evaluation. Accordingly, Dr. Harris found the FCE was not a true picture of claimant's ability to use her upper extremities.

13. Dr. Harris released claimant to return to work as tolerated with recommendations for her to perform non-repetitive and non-heavy work activities. Dr. Harris did not assign any permanent functional impairment rating to claimant because he found that claimant had subjective complaints and symptoms but had no objective measurable findings.

14. During a portion of the time that claimant was on layoff from approximately November 27, 1995, through January 7, 1996, a period of six weeks, she received unemployment compensation benefits.

15. In May 1996, claimant was laid off from her employment with respondent in a general layoff.

16. After May 1996, the record is not entirely clear as to claimant's employment activities until she started to work for Manpower Temporary Services and was assigned to the JC Penney store located in the Oak Park Mall starting in October 1996. Claimant

testified she started work for JC Penney in October 1996 and worked full-time earning $7.25 per hour or $290 per week until sometime in the latter part of December 1996. Her job duties required her to straighten up clothes, hang clothes on hangers, and bag for the cashier. Claimant testified she quit this job because she could not do it anymore.

17. Before claimant went to work for JC Penny, at her attorney's request she saw, on September 18, 1996, plastic surgeon and hand specialist Lynn D. Ketchum, M.D. Claimant provided Dr. Ketchum with a history of developing right and left lateral humeral epicondylitis problems while operating bulk machines during 12-hour shifts for respondent. After performing a physical examination of claimant, Dr. Ketchum found claimant with healing bilateral epicondylitis and recommended claimant be fitted with hinged elbow braces to wear when she returned to work. Additionally, Dr. Ketchum restricted claimant from repetitive gripping activities for six months and placed claimant in a stretching program through physical therapy.

18. On November 25, 1996, at claimant attorney's request, a preliminary hearing was held before the Administrative Law Judge requesting medical treatment for claimant's upper extremity problems through Dr. Ketchum. Dr. Ketchum's September 18, 1996, report and treatment recommendations were admitted into the preliminary hearing record. In a preliminary hearing Order dated November 26, 1996, the Administrative Law Judge appointed Dr. Ketchum as claimant's authorized treating physician.

19. On January 7, 1997, respondent recalled claimant from layoff to a cleanup job in preparation of closing the plant. This job required claimant to use a broom which aggravated her shoulders, elbows, and wrists. Claimant worked only a couple of days and returned to see Dr. Ketchum on January 9, 1997. After relating her complaints to Dr. Ketchum, the doctor recommended to respondent that claimant not perform the cleaning job.

20. Claimant testified that because she could not perform the cleaning job, she then voluntarily resigned her employment with respondent.

21. Although claimant was not working, she continued to have pain and discomfort in her upper extremities. Dr. Ketchum saw claimant again on February 20, 1997, and diagnosed claimant with bilateral myofascitis and neck torsional syndrome. At that time, Dr. Ketchum referred claimant for further evaluation and treatment recommendations to physiatrist Dr. Steve Simon at the Mid-America Rehabilitation Hospital.

22. Dr. Ketchum did not see claimant again until April 23, 1998. Claimant had undergone extensive treatment with Dr. Simon who had diagnosed claimant with bilateral epicondylitis, myofascial syndrome, including chronic arm pain, fatigue, and localized swelling known as myogelosis. Dr. Ketchum found claimant "not very functional" and recommended that claimant return for further treatment with Dr. Simon.

23. Claimant was also seen on September 15, 1998, by Dr. Ann Regier, a rheumatologist. In a letter addressed to respondent's attorney and dated October 21, 1998, Dr. Ketchum deferred to Dr. Regier's opinion when Dr. Ketchum was asked to render an opinion on the causal relationship between claimant's work while employed by respondent and her diagnosed fibromyalgia condition. Dr. Ketchum indicated that Dr. Regier's opinion was that fibromyalgia can sometimes be triggered by an injury or trauma.

24. At respondent's insurance carrier's request, Dr. Ketchum saw claimant for the last time on February 9, 1999. He found claimant was feeling much better. But he also found she still had trigger points in her trapezial and supraclavicular areas and around her shoulder girdle. Claimant's right lateral humeral epicondyle was healed but the left had mild tenderness. Dr. Ketchum released claimant to return to work but recommended that claimant have myofascial massage release exercises once a week after she did return to work.

The doctor restricted claimant from overhead work, no work requiring the same shoulder girdle position for an extended period of hours, no repetitive gripping, lifting limited to 15 pounds, work tasks should be rotated, and claimant should be allowed to stretch as needed.

25. Based on a diagnosis of mild left lateral humeral epicondylitis and bilateral myofascitis, Dr. Ketchum rated claimant with a 3 percent permanent functional impairment of each upper extremity and combined those ratings for a 4 percent whole person permanent functional impairment rating.

26. During the time claimant was under Dr. Ketchum's care and treatment, respondent provided claimant with temporary total disability benefits from January 9, 1997, through March 31, 1997, and from May 1, 1997, through January 25, 1999, for a total of 102.42 weeks.

27. After claimant's last day worked for respondent in January 1997, she testified that she did not actively seek other employment.

28. In 1999, claimant did work for a few hours for a friend at a grocery store and also worked a couple of hours at a self-service laundry. But claimant testified she could not perform those job duties because of her injuries.

29. The last job claimant was employed at was caring for some children at her home earning $50 per week. Additionally, she had finally entered into an adult education program to prepare her to take the GED examination.

30. Respondent employed vocational expert Gary Weimholt to interview claimant and develop a work task list that claimant had performed in jobs she had worked in the 15-year period next preceding her April 19, 1995, accident date.

31. Mr. Weimholt developed a list of 48 individual work tasks that claimant had performed in the jobs she had in this 15-year period. Mr. Weimholt also expressed an opinion on claimant's current ability to earn wages in the open labor market. Mr. Weimholt indicated that claimant had the current ability to earn from $240 per week to a maximum of $320 per week. In rendering that opinion, Mr. Weimholt testified that he took into consideration claimant's previous job experience, her limited educational background, and her permanent restrictions as imposed by the physicians.

32. Claimant retained the services of vocational expert Michael J. Dreiling to interview claimant and to also develop a work task list for the jobs claimant performed in the 15-year period next preceding the April 19, 1995, accident date. Mr. Dreiling saw claimant on March 25, 1999, and reported the results of the vocational assessment in a letter addressed to claimant's attorney on April 7, 1999.

Mr. Dreiling's work task list consisted of 23 individual work tasks performed in the jobs claimant had worked preceding her accident.

Mr. Dreiling also addressed the issue of claimant's current ability to earn wages, taking into consideration her past job experience, limited educational background, and significant medical restrictions. Mr. Dreiling was not overly optimistic that claimant retained the ability to return to work in the open labor market at a comparable wage. But Mr. Dreiling did testify that if claimant was selective in her placement efforts, realistically claimant could find entry-level work earning minimum wage up to approximately $7 per hour.

33. Dr. Ketchum, during his deposition testimony, individually reviewed all of the 48 work tasks as compiled by Mr. Weimholt, the vocational expert retained by respondent. Based on the permanent restrictions imposed by Dr. Ketchum, he opined that claimant had lost the ability to perform 20 of the 48 work tasks for a 42 percent work task loss.

34. Dr. Finley reviewed the 23 individual work tasks that had been compiled by Mr. Dreiling, the vocational expert retained by claimant. Utilizing the permanent restrictions she had imposed on claimant, Dr. Finley opined that claimant had lost the ability to perform 18 of the 23 work tasks for a 78 percent work task loss.

Conclusions of Law

1. K.S.A. 44-510e(a) (Furse 1993) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

> earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. However, K.S.A. 44-510e(a) (Furse 1993) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the preinjury average weekly wage.

3. If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

4. Even if accommodated work is not offered, claimant still must show a good faith effort was made to find appropriate employment. If claimant does not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The claimant should not be limited to functional impairment where the claimant attempted the offered work and was not able to perform the work because of her work-related injuries. *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

6. The parties stipulated to an April 19, 1995, accident date, a preinjury average weekly wage without fringe benefits of $386.46, and a preinjury average weekly wage with fringe benefits of $482.23.

7. The Appeals Board concludes the Administrative Law Judge's finding that claimant proved she sustained a 9.5 percent whole body permanent functional impairment as a result of her work-related injuries should be affirmed. The only two physicians who testified in this case, Dr. Ketchum and Dr. Finley, both rated claimant's permanent functional impairment according to the AMA *Guides to the Evaluation of Permanent Impairment*, Fourth Edition. Dr. Ketchum limited claimant's permanent functional impairment to claimant's upper extremities. In contrast, Dr. Finley found claimant had developed more diffuse soft tissue problems over a much wider area of her body and diagnosed claimant with fibromyalgia syndrome. Additionally, the Appeals Board finds Dr. Ketchum was requested to express an opinion on causation in reference to claimant's fibromyalgia diagnosis. But he deferred to rheumatologist Dr. Regier's opinion that fibromyalgia can be caused from injuries and other trauma.

8. The Appeals Board concludes that neither Dr. Ketchum nor Dr. Finley challenged or discredited the other's diagnosis or the other's opinion concerning claimant's permanent functional impairment as a result of her injuries. Furthermore, there are no other medical opinions in the record to otherwise question either one of these opinions.

9. The claimant argues Dr. Finley's functional impairment rating is the most credible opinion because claimant's work restrictions imposed by Dr. Finley take into consideration not only claimant's upper extremity problems but also her general pain and discomfort in her back and lower extremities. Respondent, on the other hand, argues that Dr. Ketchum's opinion is the most credible functional impairment opinion because claimant's functional injuries should be attributed only to claimant's upper extremities. Since neither of these qualified medical opinions concerning claimant's diagnosis or her functional impairment rating was discredited to the point of showing their opinions were untrustworthy, the Appeals Board finds that the physicians simply had different opinions based on their background and experience. Thus, the Appeals Board concludes both opinions should be given equal weight resulting in a permanent functional impairment rating of 9.5 percent.

10. The Administrative Law Judge found that claimant had a work task loss of 23.5 percent. Claimant contends that she has a 78 percent task loss based on the more credible opinion of Dr. Finley utilizing the work task loss list compiled by vocational expert Mr. Dreiling. Conversely, respondent argues if claimant is found to be entitled to a work disability then the most reliable and credible opinion is the 42 percent work task loss opinion of Dr. Ketchum utilizing vocational expert Mr. Weimholt's list of 48 work tasks.

11. Again, as concluded in arriving at claimant's permanent functional impairment rating, the Appeals Board finds that there is no reason to give greater weight to either Dr. Finley's or Dr. Ketchum's opinion on claimant's work task loss. Accordingly, the Appeals Board concludes claimant's work task loss is 60 percent giving equal weight to Dr. Finley's 78 percent opinion and Dr. Ketchum's 42 percent opinion.

12. The Appeals Board concludes that after claimant's temporary total disability benefits were terminated on January 25, 1999, she failed to make a good faith effort to find appropriate employment. Thus, the Appeals Board finds a post-injury average weekly wage of $290 should be imputed to the claimant. This post-injury average weekly wage is found by considering the opinions of the two vocational experts that testified along with claimant's demonstrated ability to earn post-injury $7.25 per hour while employed by JC Penney.

13. The Appeals Board concludes the claimant's wage loss component of the work disability test is 40 percent found by comparing claimant's $482.23 stipulated preinjury average weekly wage with the $290 imputed post-injury average weekly wage.

14. The Appeals Board concludes the cleanup job respondent returned claimant to in preparation of closing the plant was a job claimant could not perform because of her work-related bilateral upper extremity injuries. Claimant attempted the cleanup job but the job caused her increased pain and discomfort. Claimant's treating physician, Dr. Ketchum, recommended to respondent that claimant not continue to perform the cleanup job.

15. After claimant's April 19, 1995, accident date, claimant experienced various employment and non-employment situations during the weeks leading up to the last day

she worked for respondent on January 8, 1997. But for all the weeks between April 20, 1995, and January 8, 1997, a total of 90 weeks, the Appeals Board finds claimant was entitled either to functional disability of 9.5 percent because she remained employed by the respondent earning a comparable wage or was entitled to a work disability based either on a 100 percent wage loss or a 40 percent wage loss. Regardless of the employment or non-employment situation claimant experienced following her April 19, 1995, accident date and through January 8, 1997, when claimant left respondent's employment, she was entitled to permanent partial general disability benefits based on an average weekly rate of $386.46 which was her average weekly wage rate before she lost the fringe benefits provided by the respondent. Accordingly, before January 9, 1997, claimant was entitled to permanent partial general disability benefits at the compensation rate of $257.65 per week for 90 weeks. Then, from January 9, 1997, through January 25, 1999, claimant was temporarily and totally disabled and was paid temporary total disability benefits for 102.42[1] weeks. Also included in this period are 4.29 weeks of a 50 percent work disability at the compensation rate of $319 per week based on an average weekly wage with fringe benefits of $482.23 per week. Thereafter, claimant is entitled to a 50 percent work disability for 69.5 weeks at the compensation rate of $319 per week.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on April 6, 2000, should be, and the same is hereby, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Collette Watson, and against the respondent, Johnson Controls, Inc., a qualified self-insured, for an accidental injury which occurred April 19, 1995, and based upon an average weekly wage of $386.46 and $482.23.

Claimant is entitled to 90 weeks of permanent partial disability compensation at the rate of $257.65 per week or $23,188.50 through January 8, 1997, followed by 102.42 weeks of temporary total disability compensation at the rate of $319 per week or $32,671.98, followed by 73.79[2] weeks of permanent partial disability compensation at the rate of $319 per week or $23,539.01 for a 50 percent permanent partial general disability,

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[1] The parties stipulated that claimant was paid 102.92 weeks of temporary total disability compensation from January 9, 1997 through March 31, 1997, and from May 1, 1997 through January 25, 1999. But the number of weeks for those periods equals 102.42 instead of 102.92.

[2] This 73.79 week figure contains the 4.29 week period of April 1, 1997 through April 30, 1997, when claimant was not working and was not paid temporary total disability compensation and, therefore, was entitled to permanent partial disability benefits.

making a total award of $79,399.49, all of which is presently due and owing less amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Denise E. Tomasic, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director